

TransCanada Keystone Pipeline LP for Route Approval v. Dunavan

Case Number

S-17-1331

Case Audio

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November 1, 2018

Case Location

Lincoln

Case Summary

S-17-1331, TransCanada Keystone Pipeline LP for Route Approval v. Dunavan et al. (Appellants)

Nebraska Public Service Commission

Attorneys: James G. Powers & Patrick D. Pepper (McGrath North Mullin & Kratz, PC LLO)(for TransCanada Keystone Pipeline LP ? Appellee) --- L. Jay Bartel, David A. Lopez & Lynn A. Melson (Attorney General's Office ? for Appellee Nebraska Public Service Commission) --- David A. Domina & Brian E. Jorde (DominaLaw Group pc llo)(for Landowner Formal Intervenor - Appellants) --- Brad S. Jolly (Brad S. Jolly & Associates)(for Ponca Tribe of Nebraska ? Appellee/Cross-Appellant) Jennifer S. Baker, pro hoc vice & Leonika R. Charging (Fredericks Peebles & Morgan LLP)(for Yankton Sioux Tribe ? Appellee/Cross-Appellant) --- Kenneth C. Winston (for Sierra Club, Nebraska Chapter ? Appellee)

Civil: Application for pipeline project; Major Oil Pipeline Siting Act (MOPSA)

Proceedings below: The Nebraska Public Service Commission (PSC) granted TransCanada's application for approval of a route for a pipeline project.

Issues: 1) The PSC erred when it acted on the Application because the jurisdictional prerequisite of gubernatorial denial under Neb. Rev. Stat. §§ 57-1405 and 57-1503 was not met and the PSC lacked jurisdiction to consider, hear, or decide the Application, 2) the PSC erred when it granted Applicant a Route for which no Application was made, and did so without notice to Appellants, 3) the PSC erred when it granted Applicant a Route for which no Application was made because this action is contrary to the public interest under Neb. Rev. Stat. § 57-1407(4), 4) the PSC erred when it granted Applicant a Route for which no Application was made because TransCanada did not sustain its burden of proof under Neb. Rev. Stat. § 57-1407(4), 5) the PSC erred when it received unsworn, hearsay evidence at ?public meetings? under Neb. Rev. Stat. § 57-1407(2) and public comment directing it to hear unsworn pretrial statements in a forum allowing no confrontation, cross-examination, or procedural due process safeguards, and erred by denying a timely mistrial motion, 6) the PSC erred by receiving unsworn hearsay evidence from ?Consultants? of the PSC or other agencies and erred by construing Neb. Rev. Stat. § 57-1407(3) as authorizing it to do so and erred by denying a timely mistrial motion, 7) the PSC erred when it received evidence from ?Consultants? who were not sworn, or subject to cross-examination, and thereby denied

Appellants? procedural due process of law, and erred by denying a mistrial motion, 8) the PSC erred in following Neb. Rev. Stat. § 57-1407(2) by holding ?public meetings? prior to the contested case trial, and by receiving unsworn statements from those meetings, and by receiving unsworn evidence from ?Consultants? because the statutes and PSC actions deny procedural due process of law and are unconstitutional as applied, 9) Neb. Rev. Stat. §57-1403(3) purporting to declare that the "construction of major oil pipelines ? is in the public interest of Nebraska" is an unconstitutional invasion of PSC authority contrary to Neb. Const. art. IV, § 20, 10) Neb. Rev. Stat. §57-1403(3) purporting to declare that the "construction of major oil pipelines?is in the public interest of Nebraska" is an unconstitutional invasion and violation of the judicial power contrary to Neb. Const. art. II, § 1, 11) Neb. Rev. Stat. §§ 57-1403 & 1408 are unconstitutional because they each purport to deprive property owners of access to the courts to determine legal issues about eminent domain by a private corporation, contrary to Neb. Const. art. I, § 13, and 12) the provisions of MOPSA Neb. Rev. Stat. §§ 57-1101 et seq., and §§ 57-1401 et seq. are unconstitutional and contrary to Neb. Const. art. I, § 21 because they fail to restrict takings to those within the public need or purpose.

Issues on Cross-Appeal (Ponca Tribe of Nebraska): 1) The PSC erred in limiting the Tribe?s participation in the proceedings to ?social and cultural issues,? denying the Tribe?s right to fully participate as a party to the extent of its full expressed interests in the proceedings and limiting it to two witnesses and one hour of cross- examination to be shared with another separate party, 2) the PSC did not have authority to approve the Mainline Alternative Route because

TransCanada never applied for approval of that route, the statutory requirements of publishing and serving notice related to the Mainline Alternative Route were not met, and TransCanada did not meet its burden of proof with respect to the Mainline Alternative Route, and 3) the PSC erred in limiting its consideration of historic and cultural resources to those covered by the National Historic Preservation Act (?NHPA?), 54 U.S.C. § 300101 et seq., because MOPSA requires the PSC to consider historic and cultural resources that are in the public interest of Nebraska and not simply reiterate federal agency responsibilities.

Issues on Cross-Appeal (Yankton Sioux Tribe): 1) The PSC erred when it purported to exercise jurisdiction over the proceeding below because the PSC lacked jurisdiction to approve the proposed (or any) route, 2) the PSC erred when it exceeded its jurisdiction by approving a route that the Applicant did not apply for, without notice to the Tribe, in violation of the Tribe?s due process rights, 3) the PSC erred when it approved a route that the Applicant did not apply for

because the approved route does not serve the public interest, 4) the PSC erred when it approved a route that the Applicant did not apply for because the Applicant did not sustain its burden of proof, 5) the PSC erred when it accepted unsworn hearsay evidence through public meetings and public comments without providing the Tribe the ability to confront or cross-examine the witnesses and other due process protections, 6) the PSC erred when it accepted unsworn hearsay evidence from consultants and other agencies without providing the Tribe the ability to confront or cross-examine the witnesses or other due process protections, 7) the PSC erred when it applied Neb. Rev. Stat. § 57-1407(2), which allows the PSC to hold public meetings to receive public input and make the public input part of the record, because the statute is unconstitutional in that it denies procedural due process of law, 8) the PSC erred when it applied Neb. Rev. Stat. § 57-1407(3), which allows the PSC to accept the reports of consultants and other agencies, including opinions regarding approving, denying, or modifying the location of the proposed route of a major oil pipeline, because the statute is unconstitutional, as it denies procedural due process of law, 9) the PSC erred when it applied

Neb. Rev. Stat. § 57-1403(3), which states that
“construction of major oil pipelines . . . is in the public interest of Nebraska.” This statute is unconstitutional, as it violates Article II, § 1 of the Nebraska Constitution, 10) the PSC erred when it applied Neb. Rev. Stat. § 57-1403(3) which states that “construction of major oil pipelines . . . is in the public interest of Nebraska.” This statute is unconstitutional, as it violates Article IV, § 20 of the Nebraska Constitution, 11) the PSC erred when it applied the Administrative Procedure Act, Neb. Rev. Stat. § 84-912.02, to limit the Tribe’s participation rights as a formal intervenor instead of using its own rules of procedure, 12) the PSC erred when it limited the scope of the Tribe’s discovery to social and cultural issues in violation of the Tribe’s right to procedural due process, 13) the PSC erred when it limited the Tribe to just one witness in violation of the Tribe’s right to procedural due process, 14) the PSC erred when it restricted the Tribe’s ability to cross-examine Appellee Ponca Tribe of Nebraska’s (Ponca) witness in violation of the Tribe’s right to procedural due process, and 15) the PSC erred when it restricted the Tribe’s ability to cross-examine Ponca’s witness in violation of the Tribe’s equal protection rights.
